IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 28, 2006 Session

JAMES PETERSON, ET AL. v. PUTNAM COUNTY, TENNESSEE

Appeal from the Circuit Court for Putnam County
No. 02J0455 John J. Maddux, Jr., Judge

No. M2005-02222-COA-R3-CV - Filed on October 19, 2006

Property owners, James Peterson and his wife, Winnie Peterson, brought this action against Putnam County, alleging claims for inverse condemnation, temporary nuisance, and violations of the Tennessee Governmental Tort Liability Act ("the GTLA"). The trial court granted the county summary judgment, finding, *inter alia*, (1) that the plaintiffs' proper remedy was a claim for inverse condemnation, rather than a claim for nuisance; (2) that the plaintiffs' inverse condemnation claim was barred by the statute of limitations; and (3) that the GTLA claim fails because the plaintiffs do not fall within the protected class of persons. The plaintiffs appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Henry D. Fincher, Cookeville, Tennessee, for the appellants, James Peterson and Winnie Peterson.

Jeffrey G. Jones, Cookeville, Tennessee, for the appellee, Putnam County, Tennessee.

OPINION

I.

The facts pertinent to the issues before us are not in dispute. In June, 1981, the plaintiffs, James Peterson and Winnie Peterson, who are now 88 and 76 years old respectively, purchased the real property and improvements located at 2801 Lakeland Drive in Cookeville. The subject property is located at the base of a hill and near a lake. A paved road, running north and south on the hill, is located directly to the north of the plaintiffs' property. When they purchased the property, the plaintiffs were aware that a small sinkhole was located on the property some distance to the east of the house. The exact size and dimensions of the sinkhole at the time of the purchase are not reflected in the record.

In 1982, the Putnam County Highway Department, under the supervision of Ronnie Herron, installed a 24-inch drain tile, or pipe, under Lakeland Drive. Herron states that the decision to install the tile was a result of several complaints about water and dirt washing across Lakeland Drive. The 24-inch tile was placed beside an already existing 12-inch tile and carried surface water under Lakeland Drive and onto the plaintiffs' property.

Prior to the installation of the new pipe, the plaintiffs had written Herron to request that he not install the new drain tile. In their letter, dated August 11, 1982, the plaintiffs wrote that "[a]ll the water drains into a sink[]hole on our property and the sink[]hole is near our home. . . .[and the sinkhole] is eroding towards our house." The letter further stated that "the tile would send water gushing at greater force in one place and would destroy our lawn and make the sink[]hole widen even faster." The plaintiffs testified that, in 1982, they were aware that the sinkhole was growing and were concerned that the new 24-inch tile would destroy their property.

Immediately following the county's installation of the new drain tile, the plaintiffs' front yard began to flood after each rain. The plaintiffs complained to Herron and other county officials about the drainage problem. Herron stated that the plaintiffs approached him about installing another drain tile from the 24-inch tile to the sinkhole. The plaintiffs wanted to route the water to the sinkhole because it would decrease the amount of water that accumulated in their front yard. Herron told the plaintiffs that he could not install a tile to the sinkhole because he was not allowed to work on private property. Herron offered to get the requested tile for the plaintiffs at a discounted price, but the plaintiffs did not pursue this offer. The county took no action to remedy or address the plaintiffs' drainage problem and never assured the plaintiffs that the problem would be fixed.

The plaintiffs thereafter dug a ditch to divert the water coming onto their property from the 24-inch drain tile directly to the sinkhole. The ditch measures approximately 36 inches wide and 30 inches deep. The county did not assist the plaintiffs in digging the ditch, but the county did supply the plaintiffs with rocks to line the ditch. The ditch was lined in an effort to stave off erosion of the land under and around the ditch.

In the mid-1980s, the plaintiffs were forced to remove nine or ten large poplar trees from around the sinkhole. The frequent inundation of water had damaged and exposed the tree roots. The plaintiffs removed the trees to prevent them from falling on their house. In 1985 or 1986, the plaintiffs had two geologists examine the sinkhole for the purpose of giving suggestions as to how to improve the situation. According to the plaintiffs, the geologists suggested that they fill the sinkhole with rocks "and put some kind of metal something in the center of it." The plaintiffs testified that they did not implement the geologists' suggestion because they did not have the money to do so. Around this same time, the plaintiffs started noticing creaking and popping noises in the floor of their house. Then, in the late-1980s, their concrete patio separated from the foundation of their house. The plaintiffs continued to complain to Herron and other county officials during the 1980s and 1990s. The county did nothing.

The plaintiffs assert that, in December, 2001, they first noticed structural damage inside their home in the form of jammed doors and separated door facing and cabinets. However, Mr. Peterson testified that he could not recall exactly when he first noticed this damage, but that he thought he first noticed it around 1999 or 2000. Mrs. Peterson testified that she could not remember when she first noticed the door facings moving apart.

In 2002, the plaintiffs again asked the county for help with their drainage and sinkhole problems. The county again did nothing. The plaintiffs filed this action on October 18, 2002. The basic premise behind the plaintiffs' argument is that the county's installation of the 24-inch drain tile changed the natural flow of water, diverted a large amount of surface water across their property to the sinkhole, which caused the sinkhole to grow and damage their land and house. Their petition asserts claims for (1) inverse condemnation; (2) common law nuisance; and (3) as an alternative to their common law nuisance theory, violations of the GTLA. The alleged GTLA violations implicate T.C.A. § 29-20-203(a) (2000) and § 29-20-204(a) (2000).

The record contains the depositions of the plaintiffs and three experts. Geologist Hugh Mills examined the plaintiffs' property in April, 2003. At that time, the sinkhole measured approximately 30 feet in diameter with a maximum depth of 13 feet. The rim of the sinkhole was 26 feet from the plaintiffs' house. As of September, 2004, the rim of the sinkhole was six to ten feet closer to the house. Mills' report stated that the steep walls of the sinkhole were consistent with rapid growth. He attributed the sinkhole growth to various factors, but emphasized that the most impact stemmed from (1) the routing of surface water along the north side of Lakeland Drive, and (2) the runoff that emptied onto the plaintiffs' property from the paved road north of the property. Mills stated that the ditch dug by the plaintiffs did not "have much of an effect" because the water would have made a drainage path to the sinkhole anyway. Mills opined that the county's actions, particularly the actions affecting the drainage of water across the plaintiffs' property, caused the growth of the sinkhole. According to Mills, the county should have diverted the water away from the sinkhole.

William Vick, a civil engineer, also examined the plaintiffs' property in 2003. He was asked to determine (1) if the damage to the plaintiffs' house was caused by the growth of the sinkhole, and (2) what was necessary to remedy the situation. Vick confirmed that cabinets and wood trim were buckling and separating, but he found no significant structural damage to the house. He found no cracks on the outside of the house. He did find a hairline crack in the foundation, but added that it was a "matter of debate" as to what caused the crack. Vick expressed that he was not sure of the exact effects of the sinkhole. However, he opined that, as the sinkhole grew, the soil weakened and the foundation settled, causing the problems with the house. Vick stated that the county should have diverted the water into the nearby lake. He further stated that, if the situation was not remedied, the plaintiffs' house would eventually fall into the sinkhole. He testified that the cost of remedying the problem would be in excess of $75,000.

In 2003, residential appraiser David Roberson examined and reported on the value of the plaintiffs' property. Roberson noted that the inside of the house did not appear to have structural problems. He observed no settlement in the crawl space. Operating under the assumption that the

sinkhole did not exist, Roberson found no adverse factors which would negatively impact the marketability of the property. Again, assuming the sinkhole was not there, Roberson appraised the property at a value of $100,000. The improvements were valued at $80,000, while the land was valued at $20,000. In a later report, which took the sinkhole's existence into consideration, Roberson stated that the value of the property was limited to the land value, *i.e.*, $20,000.

The county filed a motion to dismiss, arguing that the plaintiffs failed to file suit within the applicable statute of limitations, and that, pursuant to Tenn. R. Civ. P. 12.02(6), the plaintiffs failed to state a claim upon which relief could be granted. The plaintiffs then filed a motion for partial summary judgment on the issue of the county's liability for inverse condemnation, nuisance, and negligence under the GTLA. In order to consider matters outside the pleadings, the trial court treated the county's motion to dismiss as a motion for summary judgment.

In its memorandum opinion, filed on July 21, 2005, the trial court granted the county summary judgment and dismissed the plaintiffs' suit. The court found that the plaintiffs had stated a prima facie case for inverse condemnation, but that the claim was barred by the applicable one-year statute of limitations. The trial court rejected the plaintiffs' temporary nuisance claim, holding (1) that the proper claim was for inverse condemnation, rather than nuisance, and (2) that the plaintiffs' nuisance remedy must have been brought under the terms of the GTLA, not under a common law nuisance theory. The trial court dismissed the plaintiffs' negligence claims under the GTLA, finding that the plaintiffs did not fall within the intended class of protected persons under T.C.A. § 29-20-203. This appeal followed.

II.

In this case, materials outside the pleadings, *i.e.*, affidavits, depositions, and answers to interrogatories, were filed as a part of the record and not excluded by the trial court. *See* Tenn. R. Civ. P. 12.02. This being the case, the county's motion to dismiss was properly treated and disposed of as a motion for summary judgment. ***Id.*** *See also* ***Owner-Operator Indep. Drivers Assoc. v. Concord EFS, Inc.***, 59 S.W.3d 63, 67 (Tenn. 2001). On appeal, such a motion presents a pure question of law. ***Robinson v. Omer***, 952 S.W.2d 423, 426 (Tenn. 1997); ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993). Accordingly, our review is *de novo* with no presumption of correctness as to the trial court's judgment. ***Robinson***, 952 S.W.2d at 426. The moving party is entitled to summary judgment if the facts properly before us reflect that there are no genuine issues of material fact and that the undisputed material facts show, without doubt, that the moving party is entitled to a judgment as a matter of law. ***Id.*** In making our determination, we must view the evidence in a light most favorable to the nonmoving party, and we must draw all reasonable inferences in favor of that party. ***Byrd***, 847 S.W.2d at 210-11.

III.

The plaintiffs present the following issues and sub-issues for our consideration:

> 1. Did the trial court err in holding that the plaintiffs' inverse condemnation claim was barred by the statute of limitations? Specifically, did the trial court err in holding that the plaintiffs' cause of action accrued before December, 2001? Furthermore, did the trial court err by granting summary judgment on the statute of limitations issue when such issue is a factual determination for the jury?
>
> 2. Did the trial court err in dismissing the plaintiffs' common law nuisance claim?
>
> 3. Did the trial court err in dismissing the plaintiffs' GTLA claims? Specifically, did the trial court err by failing to address the allegations of negligence brought pursuant to T.C.A. § 29-20-204(a)?

The county raises the additional issue of whether the plaintiffs' suit is barred by the equitable defense of laches.

IV.

We first address the issues surrounding the plaintiffs' inverse condemnation claim. "Inverse condemnation is the popular description of a cause of action against a governmental defendant to recover the value of the property which has been taken in fact by a governmental defendant even though no final exercise of the power of eminent domain has been attempted by the government." ***Johnson v. City of Greeneville***, 435 S.W.2d 476, 478 (Tenn. 1968). The inverse condemnation cause of action is codified at T.C.A. § 29-16-123 (2000).[1] To set forth a prima facie case for inverse condemnation, a plaintiff must allege the following elements: (1) "a direct and substantial interference with the beneficial use and enjoyment of the property at issue"; (2) "[t]he interference must be repeated and not just occasional"; and (3) "the interference must peculiarly affect the property at issue and result in a loss of market value." ***Jackson v. Metro. Knoxville Airport Auth.***, 922 S.W.2d 860, 865 (Tenn. 1996).

We, like the trial court, find that the plaintiffs have alleged a prima facie inverse condemnation case against the county. The county installed the 24-inch drain tile. The plaintiffs

---

[1] T.C.A. § 29-16-123 provides, in pertinent part, as follows:

> If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or the owner may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.

allege that the resulting increase in velocity and volume of water flowing across their property caused the sinkhole to grow and to damage their land and house. The erosion of the land, the damage to the surrounding trees and landscape, and the damage to the plaintiffs' house certainly constitute direct and substantial interferences with the plaintiffs' beneficial use and enjoyment of their property. *See* ***id.*** This interference is ongoing in nature and has resulted in a loss of market value. *See* ***id.***

Inverse condemnation actions must generally be brought within one year "after the land has been actually taken possession of, and the work of the proposed internal improvement begun. . . ." T.C.A. § 29-16-124 (2000).[2] The trial court dismissed the plaintiffs' inverse condemnation claim as time-barred. The court specifically found that the applicable one-year statute of limitations began to run in late-1982, when the county installed the 24-inch drain tile and when the plaintiffs outlined their fears in the letter to Herron. The court further noted that, at the very latest, the inverse condemnation claim accrued in the mid-1980s, when the plaintiffs were forced to remove the large trees from their property. The plaintiffs assert that the trial court erred in finding that their inverse condemnation claim was time-barred because, so they argue, the cause of action did not accrue, and thus the statute of limitations did not begin to run, until December, 2001, when the plaintiffs first noticed the structural damage inside their house.

Our Supreme Court's decision in ***Knox County v. Moncier***, 455 S.W.2d 153 (Tenn. 1970), controls this issue. The facts and ultimate outcome in ***Moncier*** are distinguishable from the instant case, but the Court's analysis with respect to the statute of limitations issue remains the same. In ***Moncier***, the High Court stated:

> In determining what amounts to a "taking" in a case and when the "taking" is complete so as to give the landowner a cause of action and begin the running of the statute of limitations, the Court must look to the facts in the particular case under consideration. ***Davidson County v. Beauchesne*** (1955), 39 Tenn.App. 90, 281 S.W.2d 266.
>
> * * *
>
> The statute of limitations should be applied in such a manner that the landowner will have the one year period within which to bring his suit "after injury or after reasonable notice or knowledge of such injury

---

[2] T.C.A. § 29-16-124 provides the following:

> The owners of land shall, in such cases, commence proceedings within twelve (12) months after the land has been actually taken possession of, and the work of the proposed internal improvement begun; saving, however, to unknown owners and nonresidents, twelve (12) months after actual knowledge of such occupation, not exceeding three (3) years, and saving to persons under the disabilities of infancy and unsoundness of mind, twelve (12) months after such disability is removed, but not exceeding ten (10) years.

> and damage." ***Morgan County v. Neff*** (1953), 36 Tenn.App. 407, 256 S.W.2d 61. We would add to this that the landowner should have one year to commence his action after an injury to his property which reasonably appears to him to be a permanent injury rather than a temporary one. Only when the injury is permanent in nature can there be a "taking" within the contemplation of the statute; and until there is a "taking" the statute of limitations does not begin to run.

455 S.W.2d at156. In ***Moncier***, the property owner brought an inverse condemnation action against the county, claiming that the county's construction of an interstate highway caused flood damage to his property. ***Id.*** at 154-55. The construction of the highway commenced in late-1962 or early-1963. ***Id.*** at 155. During a heavy rain storm in March, 1963, water and mud flooded the plaintiff's property and the basement of a building on the plaintiff's property. ***Id.*** The plaintiff immediately contacted the State Highway Department for assistance. ***Id.*** In response to the plaintiff's problem, the Highway Department reconstructed a catch basin and installed additional drain tiles. ***Id.*** During rain events over the next two years, mud and debris would wash upon the plaintiff's property, but the plaintiff's building did not flood again until a heavy rain storm in January, 1965. ***Id.*** The plaintiff filed suit in June, 1965 – *i.e.*, more than one year after the 1963 flood but less than one year after the 1965 flood. ***Id.***

The Court concluded that the "taking" of the plaintiff's property had occurred during the 1965 flood, rather than the 1963 flood. ***Id.*** at 156. Thus, the plaintiff's suit, filed in 1965, was timely. ***Id.*** In making this determination, the Court noted that, though the plaintiff's property was damaged during the 1963 flood, the evidence did not indicate that the 1963 flood was caused by the highway construction because, at the time, only a small amount of grading work had been done. ***Id.*** Additionally, the Court noted that, from 1963 to 1965, the plaintiff discussed the drainage problems with State engineers on numerous occasions, and he was assured by the engineers that the flooding would be alleviated. ***Id.*** As explained by the Court,

> during this time period, 1963 to 1965, [plaintiff] reasonably assumed that any injury to his land was of a temporary nature. However, after a substantial part of the construction was completed in September 1964, and subsequent flooding occurred in January 1965, plaintiff was then justified in assuming that such flooding constituted a permanent situation and not merely a temporary inconvenience. This was the first time that [plaintiff] could be charged with knowledge that the injury to his property was permanent, thus constituting a "taking."
>
> We do not hold that a property owner can sit idly by and wait to commence his suit at any time which is convenient with him, thereby circumventing the purpose of the statute of limitations. *What we do hold is that the onus is on the property owner to institute his suit*

> *within one year after he realizes or should reasonably realize that his property has sustained an injury which is permanent in nature*. At that time the "taking" occurs and the statute of limitations begins to run.

Id. (emphasis added); *see* ***Leonard v. Knox County***, 146 S.W.3d 589, 595-97 (Tenn. Ct. App. 2004).

The case of ***Wyatt v. Lake County Tennessee***, 1991 WL 138516 (Tenn. Ct. App. W.S., filed July 30, 1991), also provides guidance on this issue. In ***Wyatt***, the property owners sued the county for inverse condemnation, claiming that the county's installation of a culvert led to the flooding of approximately 20 acres of the plaintiffs' property. ***Id.***, at *1. The county installed the culvert at issue on September 5, 1983. ***Id.*** The flood occurred in November or December of that same year. ***Id.*** The plaintiffs filed suit on September 24, 1984. ***Id.*** One of the plaintiffs testified that he knew, *when the county was installing the culvert*, that the culvert was too small and would not provide proper drainage for his property. ***Id.***, at *3. The Court of Appeals, after quoting the rule set forth in ***Moncier***, held that the plaintiffs' suit was filed too late because

> the injury that constituted the "taking" took place in early September, 1983, when one of the co-owners of the property became aware that a permanent culvert installed under the ramp would not drain the water because of the culvert's position and the fact that it was undersized. This should have put him on notice.

Id., at *4.

The question before us is not when the plaintiffs first noticed damage to the internal structure of their house, but when the plaintiffs knew or should have known that their property had suffered permanent injury as a result of the county's actions. The plaintiffs' 1982 letter to Herron acknowledges the proximity of the sinkhole, the erosion of the sinkhole, and the problems that would likely ensue as a result of the new drain tile. In the mid-1980s, the flooding caused by the drain tile forced the plaintiffs to remove several trees from their property. Also in the mid-1980s, the plaintiffs contacted two geologists to evaluate the sinkhole situation and to make suggestions on how to remedy the problem. The plaintiffs also started hearing creaking and popping noises in their house at this time. Then, sometime in the late-1980s, their concrete patio separated from their house. The county never assured the plaintiffs that their damage was temporary or would be alleviated. *Cf.* ***Leonard***, 146 S.W.3d at 596-97 ("We believe the testimony of Plaintiff and [Plaintiff's former girlfriend] to the effect that they were told as late as May of 1999 that the flooding would be remedied once the project was completed constitutes material evidence to support the jury's verdict that the one year statute of limitations had not expired when the complaint was filed on December 30, 1999."). The facts before us indicate that, by the mid-1980s, the plaintiffs knew or should have known that the damage caused by the county's installation of the 24-inch drain tile was permanent.

The plaintiffs argue that, in water flow cases such as this, a new cause of action accrues every time the water flows across the plaintiffs' property. They rely on the following statement from the case of ***Kind v. Johnson City***, 478 S.W.2d 63 (Tenn. Ct. App. 1970), for this argument:

> [t]he nuisance created and maintained by the City is temporary and continuous in character, and the very continuation of the nuisance is a new offense entitling complainants' to recover damages within the statutory period next preceding the suit, although more than the statutory period has elapsed since the creation of the nuisance.

Id. at 66. The decision in ***Kind*** is distinguishable, however, in that it is not an inverse condemnation case. It is a common law temporary nuisance case; therefore, its holding must be read in that context. The plaintiffs also argue that we should adopt the "continuing claims" doctrine for inverse condemnation cases. They urge us to follow the case of ***United States v. Dickinson***, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947), for the proposition that "[t]he statute of limitations does not begin to run in a water damage inverse condemnation case until the damage has stabilized." We reject these arguments. This Court is bound by Tennessee law. Tennessee law on this issue is straightforward. An inverse condemnation cause of action accrues, and the one-year statute of limitations begins to run, when the plaintiff "realizes or should reasonably realize that his property has sustained an injury which is permanent in nature." ***Moncier***, 455 S.W.2d at 156.

The plaintiffs further contend that the trial court erred in granting summary judgment on this issue because, as they argue, "[the statute of limitations] determination is a factual issue reserved for the jury." The accrual of a cause of action is a question of fact to be determined by the trier of fact when "the evidence is conflicting or the time is not clearly provided and is a matter of inference from the testimony." ***Osborne Enters., Inc. v. City of Chattanooga***, 561 S.W.2d 160, 165 (Tenn. Ct. App. 1977) (citation omitted). If, however, the evidence is undisputed and only one conclusion can be reasonably drawn from it, the accrual of a cause of action is a question of law to be determined by the court. ***Id.*** (citation omitted). The letter to Herron establishes that the plaintiffs were aware, in August, 1982, that the drain tile being installed by the county would "destroy" their property. At the absolute latest, the plaintiffs became aware of their property's permanent injury in the mid-1980s, when they were forced to remove the damaged trees. We find that only one conclusion can be drawn from this evidence – the plaintiffs' inverse condemnation claim filed on October 18, 2002, some 20 years after the installation of the drain tile and a number of years after the events of the 1980s and 1990s, was not brought within a year of the plaintiffs' knowledge that their property had sustained permanent injury. Therefore, the plaintiffs' inverse condemnation claim is time-barred.

V.

A.

We next address the plaintiffs' common law nuisance cause of action, which alleges that the county's "wrongful interference with the natural drainage of surface water" constitutes a temporary

and continuous nuisance. The trial court found that this claim failed because (1) the plaintiffs' claim, in effect, was one for inverse condemnation, rather than nuisance, and (2) the plaintiffs' nuisance remedy must have been brought under the provisions of the GTLA, rather than under a common law nuisance theory. We agree with the trial court on both findings.

B.

The first issue with respect to the plaintiffs' common law nuisance claim – *i.e.*, whether the plaintiffs' proper cause of action was a claim for inverse condemnation, rather than a temporary nuisance claim – has been addressed by the courts of this State on numerous occasions. A nuisance has been defined as "anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable." ***Pate v. City of Martin***, 614 S.W.2d 46, 47 (Tenn. 1981). A temporary nuisance is one that "can be corrected by the expenditure of labor or money. " ***Id.*** at 48. The determination that a "taking has occurred [, as opposed to a nuisance,] depends on the facts of each case, specifically the nature, extent and duration of the intrusion." ***Burchfield v. State of Tennessee***, 774 S.W.2d 178, 183 (Tenn. Ct. App. 1988). Where the adverse effect amounts to a "taking" of property by the government, the plaintiff's proper remedy is one for inverse condemnation under the eminent domain statutes. *See* T.C.A. § 29-16-123, 124; *see* ***Pleasant View Util. Dist. v. Vrandenburg***, 545 S.W.2d 733 (Tenn. 1977); ***Monday v. Knox County***, 417 S.W.2d 536 (Tenn. 1967); ***Smith v. Maury County***, No. 01-A-01-9804-CH-00207, 1999 WL 675135 (Tenn. Ct. App. M.S., filed September 1, 1999).

In the case of ***Monday v. Knox County***, the plaintiff filed a common law nuisance action against the county, alleging that the county's construction of a nearby highway had caused excessive amounts of water to collect on the plaintiff's property. 417 S.W.2d at 536. The plaintiff sought a mandatory injunction. ***Id.*** The trial court dismissed the plaintiff's suit, holding that the plaintiff's allegations amounted to a "taking" by the county and that the exclusive remedy was a claim under the eminent domain statutes. ***Id.*** The Supreme Court affirmed, stating that "there has been a taking of [the plaintiff's] property for public use for which the remedy is reverse condemnation proceedings and [the county] would not be liable on the theory of a nuisance." ***Id.*** at 537. Notably, the plaintiff argued that the intrusion only amounted to a temporary nuisance because the condition causing the damages could be remedied by certain changes in the construction of the highway. ***Id***. The Court rejected this argument by stating that "the Court has no authority to order such change in construction; for to do so would in effect be constructing public roads by judicial order." ***Id.***

Similarly, in ***Pleasant View Util. Dist. v. Vrandenburg***, the plaintiffs filed an action to enjoin a utility district from discharging thousands of gallons of waste water on their property. 545 S.W.2d at 734. The utility district moved to dismiss the plaintiffs' suit, primarily arguing that its actions amounted to a "taking," rather than a nuisance. ***Id.*** The utility district asserted that the plaintiffs' proper remedy was an action for inverse condemnation, and furthermore, that any inverse condemnation action was now barred by the one-year statute of limitations for such actions. ***Id.*** at 734-35. The trial court granted the utility district's motion to dismiss. ***Id.*** at 735. As noted by the Supreme Court, the Court of Appeals reversed and remanded, concluding that the plaintiffs' suit was

"'not a suit for damages in reverse condemnation [but] is primarily an injunction suit praying for injunctive and general relief.'" ***Id.*** (bracketing in original). The Supreme Court reversed the Court of Appeals and affirmed the trial court's judgment. ***Id.*** at 736. In doing so, the Supreme Court stated the following:

> Basically, we disagree with the Court of Appeals as to the nature of the suit. Though couched in terms of a nuisance, [the plaintiffs] seek to enjoin an act by [the utility district] which, in our opinion, is an act of "taking" an interest in real property.
>
> * * *
>
> Having the power of eminent domain, any action of [the utility district], in carrying out the purposes for which it was created, which destroys, interrupts, or interferes with the common and necessary use of real property of another is a "taking" of such property, and the landowner's remedy is an action for damages under the inverse condemnation statute ([T.C.A. § 29-16-123]), not injunctive relief; and, the action for damages is subject to the one year time limitation set forth in T.C.A. [§ 29-16-124].

Id. at 735. *See also* ***Murphy v. Raleigh Util. Dist.***, 373 S.W.2d 455, 456-57 (Tenn. 1963) (affirming the trial court's dismissal of the plaintiff's nuisance claim by holding that the utility district's release of water onto the plaintiff's property and the resulting erosion amounted to a "taking," the remedy for which was subject to the one-year statute of limitations for inverse condemnation actions); ***Burchfield***, 774 S.W.2d at 183 (reversing the trial court's award of damages for temporary nuisance when "the facts of th[e] case more nearly parallel the cases where a taking has been held to occur than those where it has not.").

On the other hand, ***Hayes v. City of Maryville***, 747 S.W.2d 346 (Tenn. Ct. App. 1987), provides an example of a case in which this Court found that a temporary nuisance claim, rather than an inverse condemnation claim, was the plaintiffs' proper cause of action. ***Id.*** at 350. The plaintiffs operated a used car business. ***Id.*** at 347. The city constructed a median strip in the highway abutting the plaintiffs' business. ***Id.*** The construction of the median created one-way lanes of traffic in front of the plaintiffs' property. ***Id.*** Thus, one direction of lanes had immediate access to the plaintiffs' property, while the other direction of lanes was now blocked by the median strip. ***Id.*** The evidence was that one would have to drive approximately a half-mile before they were able to turn into the lanes that accessed the plaintiffs' property. ***Id.*** at 347-48. The plaintiffs filed an action for inverse condemnation, alleging (1) a loss or serious impairment of their right of access, and (2) that their property had suffered erosion damage by excessive water runoff caused by the city's improvements. ***Id.*** at 347. The Court of Appeals held that the impairment of access that resulted from the construction of the median strip did not amount to a "taking." ***Id.*** at 349. The Court also held that the proper claim for the plaintiffs' water damage was a claim for temporary nuisance, rather

than a claim for inverse condemnation. ***Id.*** at 350. In making the determination that the proper claim for the plaintiffs' water damage was temporary nuisance, the Court stressed the fact that the city had corrected the drainage problem by "the expenditure of labor or money." ***Id.***; *see also* ***Pate***, 614 S.W.2d at 48.

After extensive review of these cases and others, we conclude that the plaintiffs' proper cause of action was a claim for inverse condemnation, rather than a claim for temporary nuisance. The plaintiffs' damages are of such a nature, extent, and duration that one can only conclude that a "taking" has occurred. *See* ***Burchfield***, 774 S.W.2d at 183. The plaintiffs were forced to remove several large trees from their property. The plaintiffs lost a sizable amount of their property to erosion. The plaintiffs' house is within feet of being consumed by a sinkhole. The plaintiffs' petition even states that "[t]he nuisances complained of have damaged the [p]laintiffs in the amount of the full value of [the p]laintiffs' [l]and." The idea and allegation that the county is liable for damages in the amount of the entire value of the plaintiffs' property further supports the finding that a "taking," rather than a temporary nuisance, has occurred.

C.

The trial court also found that the plaintiffs' common law nuisance claim should be dismissed because the plaintiffs' nuisance remedy against the county must have been brought under the provisions of the GTLA, rather than under a common law theory of nuisance. The plaintiffs assert that it is "an open issue as to whether [they] must proceed solely under the GTLA or if there is an independent cause of action for nuisance outside the GTLA. . . ."

In Tennessee, a nuisance-type claim that seeks *damages* against a governmental entity must be brought under the terms of the GTLA. *See* ***Hayes***, 747 S.W.2d at 350 (stating that the plaintiffs' temporary nuisance claim for damages against the city "must be adjudicated under the provisions of the [GTLA]."); ***Collier v. Memphis Light, Gas & Water Div.***, 657 S.W.2d 771, 776 (Tenn. Ct. App. 1983) ("The legislature left little if any room for doubt that actions against governmental entities for damages based on activities historically labeled 'nuisance' are now included in and covered by the [GTLA]."); *see generally*, ***Britton v. Claiborne County, Tennessee***, 898 S.W.2d 220, 222 (Tenn. Ct. App. 1994); ***Smith***, 1999 WL 675135, at *3; ***Keebler v. Johnson City***, No. 03A01-9511-CV-00401, 1996 WL 471466, at *1-2 (Tenn. Ct. App., E.S., filed August 21, 1996).

Our courts have held, however, that an *equitable action to abate* a nuisance created by a governmental entity is permitted outside of terms of the GTLA. *See* ***Paduch v. City of Johnson City***, 896 S.W.2d 767, 772 (Tenn. 1995) (stating that "[a] cause of action under the [GTLA] may lie for activities of a governmental entity for which immunity has been waived even though such activities may also be the basis for the equitable action to abate a nuisance."); ***Jones v. Louisville & Nashville R.R. Co.***, 1986 WL 3435, at *3 (Tenn. Ct. App. M.S., filed March 21, 1986) ("There is nothing in the [GTLA] which removes the inherent power of a court of equity to abate a nuisance created by a governmental entity.").

The plaintiffs' common law nuisance cause of action seeks *damages* from the county. Their petition does not seek injunctive relief or declaratory judgment. Thus, their nuisance remedy must have been brought under the provisions of the GTLA.

VI.

The GTLA, which is codified at T.C.A. § 29-20-101 *et seq.* (2000 & Supp. 2005), grants blanket immunity to subordinate governmental entities, such as counties, subject to certain statutory exceptions. The plaintiffs argue that two exceptions are relevant to their case: T.C.A. § 29-20-203, which at subsection (a) removes sovereign immunity for "any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity"; and T.C.A. § 29-20-204, which at subsection (a) removes sovereign immunity for injuries "caused by the dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned and controlled by such governmental entity."

The trial court dismissed the plaintiffs' claim under T.C.A. § 29-20-203(a) after finding that the plaintiffs were not within the provision's class of protected persons. The purpose of this specific exception is to protect motorists and others who utilize the public roadways. ***Britton***, 898 S.W.2d at 223. There is no evidence that the county's installation of the 24-inch drain tile rendered a road "defective, unsafe, or dangerous." To the contrary, there is evidence that, prior to the county's installation of the 24-inch drain tile, water and dirt washed across Lakeland Drive, causing a potential danger on the roadway. The county remedied this potential danger by installing the larger drain tile under the road.

As an alternative to T.C.A. § 29-20-203(a), the plaintiffs allege that T.C.A. § 29-20-204(a) removes the county's immunity because the county created a dangerous or defective condition in a "public . . . structure" or "public improvement" by installing the 24-inch drain tile. The trial court's memorandum opinion failed to address the plaintiffs' allegations under this provision. The plaintiffs assert that, because the trial court did not address T.C.A. § 29-20-204(a), the issue should be permitted to go to trial. We disagree.

The GTLA provides for a 12-month statute of limitations on all claims arising under it. T.C.A. § 29-20-305(b). "[A] cause of action 'arises' under the GTLA when the plaintiff discovers, or in the exercise of reasonable care should have discovered, that he or she sustained an injury as a result of the defendant's wrongful conduct." ***Sutton v. Barnes***, 78 S.W.3d 908, 916 (Tenn. Ct. App. 2002). "[A] plaintiff may not delay filing merely because the full effects of the injury are not actually known; 'such a delay would conflict with the purpose of avoiding uncertainties and burdens inherent in pursuing and defending stale claims.'" ***Id.*** at 913 (citing ***Wyatt v. A-Best Co.***, 910 S.W.2d 851, 855 (Tenn. 1995)). The county installed the drain tile in 1982. Immediately thereafter, the plaintiffs started experiencing problems as a result of the new tile. By the mid- to late-1980s, the plaintiffs were aware that the drain tile had caused injury to their property. They may not have known then the full extent of their damages, but this does not excuse them from timely pursuing their

claims under the GTLA. The plaintiffs did not file suit until October 18, 2002. Their claims under the GTLA are therefore time-barred.

VII.

The county asserts that the plaintiffs' entire suit is barred by the doctrine of laches. The defense of laches involves a mixed question of law and fact and its essential elements include an unexcused delay by the plaintiff in making the claim and a showing by the defendant that he or she has been injured due to the delay in the presentation of the claim. ***Jansen v. Clayton***, 816 S.W.2d 49, 51 (Tenn. Ct. App. 1991); ***Freeman v. Martin Robowash, Inc.***, 457 S.W.2d 606, 611 (Tenn. Ct. App. 1970). Laches is an affirmative defense. As such, it must be pled. Tenn. R. Civ. P. 8.03. The county's answer does not mention the defense of laches by name. More importantly, it does not set forth facts which constitute this defense, *e.g.*, facts pertaining to the county's injuries sustained as a result of the plaintiffs' delay. This issue is found adverse to the county.

VIII.

The judgment of the trial court is affirmed. This case is remanded to the trial court for the collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellants, James Peterson and Winnie Peterson.

_____

CHARLES D. SUSANO, JR., JUDGE